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IN THE

Supreme Court of the United States

RAMAPOUGH MOUNTAIN INDIANS and SILENT WOLF, CHIEF RAMAPOUGH MOUNTAIN INDIANS,

Petitioners,

v.

GALE A. NORTON, SECRETARY, U.S. DEPT. OF INTERIOR, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

The Ramapough Mountain Indians ("RMI") descend from the historical Leni Lenape Indians — also variously called "Delaware" or "Munsee," among other names. Most of the RMI still live in the Ramapough Mountains on the border of New York and New Jersey, where their 18th century ancestors moved in the face of European settlement. Scholars and historians universally agree that the RMI descend from the Lenape Tribe. The RMI are recognized as an Indian Tribe by the State of New Jersey. In 1979, they applied for federal recognition pursuant to the Bureau of Indian Affairs ("BIA") acknowledgment regulations at 25 C.F.R. Part 83. The Part 83 regulations require a petitioner to demonstrate, with a reasonable likelihood, that it has maintained a distinct community from historic times, and that its members descend from a historical Tribe or Tribes that combined. BIA refused to recognize the RMI, finding that the Tribe had "Afro-Dutch" ancestry and no Indian ancestry. At oral argument before the Court of Appeals, the BIA conceded that the RMI are Indians, but asserted that the Tribe provided no evidence of descent from the aboriginal Lenape Indians, who are the only Indian tribal group ever to have occupied the region. The Court of Appeals concluded that the BIA had not "clearly erred" in refusing to infer Lenape Tribal ancestry for the RMI. Accordingly, the question presented for review is:

Whether the Bureau of Indian Affairs can deny Tribal descent by dismissing key pieces of evidence under a conclusiveness standard, ignoring reasonable inferences, and discounting each piece of evidence in isolation without regard to the cumulative weight of the evidence.

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Petitioner RMI respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia in this case.

The Court of Appeals upheld the decision of the Bureau of Indian Affairs denying Federal recognition as a Native American nation to the petitioner. In so doing, the Court of Appeals acknowledged that the RMI made a "strong argument" that the BIA used the wrong standard of law — conclusive rather than reasonable likelihood — in evaluating the case and the issue of tribal descent. Nevertheless, the Court of Appeals did not decide the threshold issue of proper legal standard of review. Without citing any precedent, the court further found that the BIA was not required to make inferences from the record evidence in ruling on tribal descent. With each piece of evidence isolated and held up to a "conclusive" standard, the BIA erected an unlawful filter and thus determined that the RMI presented "no evidence" of tribal descent. In essence, the Court of Appeals found that the BIA has absolute power in deciding issues of federal recognition and need not adhere to the plain language of its own promulgated regulations or the requirements of established administrative law. Unless this Court intervenes, the 23-year epic struggle of the Ramapough Mountain Indians to claim their rightful heritage and to be federally recognized will tragically end with the rewriting of American history and the administrative genocide of the Tribe.

OPINIONS BELOW

The Order of the United States Court of Appeals for the District of Columbia Circuit affirming the Memorandum Opinion and Order of the district court granting summary judgment (Appendix A) is reported at 25 Fed. Appx. 2.

The February 15, 2002 order of the Court of Appeals denying rehearing (Appendix D) is not reported. The Memorandum Opinion and Order of the United States District Court for the District of Columbia granting summary judgment (Appendix C) and the Order of that court denying the Government's motion for correction and clarification (Appendix B) are not reported. The Bureau of Indian Affairs notice of Reconsidered Final Determination (Appendix E) is published at 63 Fed. Reg. 888 (January 7, 1988). The Bureau of Indian Affairs notice of Final Determination (Appendix F) is published at 61 Fed. Reg. 4476 (February 6, 1996).

STATEMENT OF JURISDICTION

On February 15, 2002 the D.C. Circuit Court of Appeals entered its order denying the petition for rehearing in this matter. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

25 U.S.C. § 2:

> The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior . . . have the management of all Indian affairs and of all matters arising out of Indian relations.

25 U.S.C. § 9:

> The President may prescribe such regulations as he may think fit for carrying into effect the various

> provisions of any act relating to Indian affairs, and for he settlement of the accounts of Indian affairs.

25 C.F.R. § 83.7(e)(1) of the Federal Acknowledgment regulations provides:

> The petitioner's membership consists of individuals who descend from a historical Indian tribe or from historical Indian tribes that combined and functioned as a single autonomous political entity.
>
> (1) Evidence acceptable to the Secretary which can be used for this purpose includes but is not limited to:
>
> * * *
>
> (ii) State, Federal or other official records or evidence identifying present members or ancestors of present members as being descendants of a historical tribe or tribes that combined and functioned as a single autonomous political entity.
>
> (iii) Church, school and other similar enrollment records, identifying present members or ancestors of present members as being descendants of a historical tribe or tribes that combined and functioned as a single autonomous political entity.
>
> (iv) Affidavits of recognition by tribal elders, leaders, or the tribal governing body identifying present members or ancestors or present members as being descendants of a historical tribe or tribes that combined and functioned as a single autonomous political entity.

> (v) Other records or evidence identifying present members or ancestors or present members as being descendants of a historical tribe or tribes that combined and functioned as a single autonomous political entity.

Additional relevant provisions of 25 C.F.R. Part 83 are reproduced as Appendix G.

STATEMENT OF THE CASE

A. *Background.*

The Ramapough Mountain Indians ("RMI") are a Tribe of 2600 Native Americans living in settlements in and near the Rampough Mountains. There are four core RMI families — Mann, Van Dunk, Defreese, and DeGroat — tracing back to the late 1700's; 98% of the current membership descend from at least two of these four major families. Proposed Finding Against Federal Acknowledgment of the Ramapough Mountain Indians, 59 Fed. Reg. 64662 (December 8, 1993). The BIA's staff Anthropologist concluded that the RMI, has "existed as an isolated community for nearly 200 years." AR000449.[1] The BIA's staff historian concluded that the RMI, "does represent a distinct community with significant continuity from the early 19th century to the present." AR000307. Based on the RMI's very high levels of in-group marriage, the BIA's genealogist concluded, "the RMI consists of a group of people who have lived along the border of

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1. Unless otherwise noted, fact citations are to the 30,000-page Administrative Record developed by the BIA in reviewing the RMI's petition and referenced with the "AR" number that the BIA assigned.

northern New Jersey and southern New York State for more than 200 years." AR000461.

Eighteenth century Indian deeds for land sold by Lenape Indians in the Ramapough Mountain area establish that several local Indians had by the 1720's taken the surname, "Manes" (AR006102, 6108), probably derived from the Dutch name "Mannde" (AR006084-87), who was one of the original 17th century Dutch patent holders for the Tappan/ Hackensack/Ramapough region (AR006075-79). Certified Genealogist Roger Joslyn determined that the RMI Mann family line descends from these "Manes" Indians.[2] BIA admitted it could offer no alternative ancestors for this line (whether "Afro-Dutch" or otherwise). AR000327.

A Lenape/Tappan Indian named John Defries, who was born about 1735, was listed on the Colonial New York muster rolls during the 1760's in Tappan — located about three to five miles from the Ramapough Mountains. AR006111-20. The BIA instructed the RMI to trace its genealogy to this Tappan Indian in order to prove descent from an Indian Tribe. AR009506. Certified Genealogist Roger Joslyn traced the Defreese line to this Tappan Indian, based on a reasonable likelihood. (Submitted herewith as a Lodging). BIA rejected this link as not being documented with "certainty" (AR009527) and not being "clear" (AR000470).

In 1765, Peter Hasenclever, who managed the Ramapough Mountain ironworks at Ringwood (one of the

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2. February 18, 2000 report of Roger Joslyn. Although this report was submitted to BIA subsequent to the agency proceedings, it is based on information contained in the Administrative Record, some of which the BIA did not disclose to the RMI until after the close of the agency proceeding.

three main RMI settlements is in Ringwood, NJ), wrote a letter giving a detailed description of Lenape Indians still living in the Ramapough Mountains. AR006131-32. This letter is significant as it demonstrates that the Lenape had not all left the area by 1758, as asserted by the BIA as a major basis for rejecting the RMI's descent from the Lenape Tribe. AR020179.

Documented RMI ancestors appear in the earliest tax records for the area, dating from the 1770's, with their names grouped together on the various rolls, showing they were living in proximity to each other. Although the tax records do not show exact locations, property deeds dating from the 1820's show that the RMI ancestral settlement was located in the Ramapough Mountains, in an area known as the Green Mountain Valley.[3] In 1827, Victor Jacquemont, a French naturalist, wrote a letter documenting that a community of "mixed race" Lenape/ Delaware Indians were living in that same area. BIA refused to credit the Jacquemont letter as evidence of Lenape descent for the RMI, stating it was not "certain" that he was referring to the RMI ancestors. AR000118.

During the 1870's, Reverend George Ford established a church in the mountains for the RMI ancestors, where he preached to them for four years. He documented that they had "considerable Indian blood coming down from the early days." AR006263-93. Contemporaneously with Ford's ministry, the 1876 centennial history of Bergen County, documented that Lenape Indians — referred to as, "Hackensacky" Indians — still lived in the Ramapough Mountains. The BIA refused to credit Ford's letter or the 1876 history as evidence of Indian or Lenape ancestry for the RMI.

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3. Cohen, David, *The Ramapo Mountain People*, (Rutgers University, 1974), pgs. 45-56. Cohen's book, which was the sole source for BIA's contention that the RMI have only Afro-Dutch ancestry, appears in full in the Administrative Record.

In the 1890's, Christian R. Christie (a/k/a "Squire" Christie, 1816-1895), a member of a prominent family that had settled in the area before 1750, documented in an interview that a "semi-civilized race of . . . half Indian" people, with the names, Van Dunk, Mann and Degroat, had lived in the Ramapough Mountains since the time of his grandfather, and descended from the Indians who had lived in the region "before there were records." AR006195. BIA gave no credit to this evidence.

In 1910, linguist Dynley Prince studied the RMI ancestors and identified them as descendants of the Lenape, based on their continued use of a remnant of the historic Lenape language known as "Jersey Dutch," which had died out years earlier. AR000290, 423. In 1911, Alanson Skinner, a well-respected anthropologist and curator of the NY Museum of Natural History, documented Charles Mann, an RMI ancestor, as a Lenape descendent. AR006385. In 1911, world-renowned Anthropologist and expert on the Lenape, Dr. Frank Speck, documented that the RMI community dated to before the Revolutionary War and was descended from Lenape Indians. AR006344. The Vineland Study, a study of the RMI by the State of New Jersey, identified numerous RMI ancestors as Indians descended from the historic Lenape tribe. AR006536-41, 22315. This finding was affirmed by the State Colony of New Jersey, another N.J. State institution. AR006364.

An official 1947 Federal report from the Smithsonian Institution written by anthropologist William Harlem Gilbert, Jr. entitled, "Surviving Indian Groups of the Eastern United States," documents that the RMI are descendents of the Lenape Indians. AR006391-92. This Federal report identifies the family names of DeGroat, De Vries, Mann, and Van Dunk as historic RMI families. AR006395. During the 1970's, the State of New Jersey officially recognized the RMI as an Indian Tribe.

During the petitioning process, Certified Genealogist Roger Joslyn prepared an extensive genealogical study of the RMI, demonstrating their descent from the Lenape. His conclusions are set forth in the Lodging.

The preceding discussion represents only the briefest overview of some of the evidence of descent presented by the RMI in its recognition petition, and included in the 30,000-page Administrative Record before the BIA.

B. *The Acknowledgment Process.*

Historically, Congress, Courts and the BIA have all exercised the power of recognizing Indian Tribes. *Cherokee Nation of Oklahoma v. Babbitt,* 117 F.3d 1489 (D.C. Cir 1997); *Mashpee Tribe v. New Seabury Corp.,* 592 F.2d 575 (1st Cir. 1979); *Montoya v. United States*, 180 U.S. 261 (1901). Prior to 1978, the BIA made determinations of federal recognition on an *ad hoc* basis. *Muwekma Tribe v. Babbitt*, 133 F. Supp. 2d 42 (2001). In 1978, the Department of the Interior promulgated its Part 83 regulations governing the acknowledgment of Indian Tribes. 25 C.F.R. Part 83. As authority for these regulations, the Department relies on its general delegation of authority over Indian affairs from Congress, 25 U.S.C. §§ 2 & 9. The acknowledgment regulations require that a petitioning group be identified by outsiders as an "Indian" entity, and also require a detailed examination of a petitioning Indian group's community, political leadership, and descent from an historical Tribe or Tribes that combined, from the time of first sustained White contact until modern times. 25 C.F.R. § 83.7. Under the regulatory process, the BIA's technical staff — the Branch of Acknowledgment and Research ("BAR"), composed of historians, anthropologists and genealogists — evaluate a petition, make technical findings and submit a report to the Assistant Secretary who then signs the final recognition decision.

The legal test to be applied in the process of evaluating petitions and rendering decisions is that of "reasonable likelihood." 25 C.F.R. § 83.6(d). *Greene v. Babbitt*, Case No. Indian 93-1, pg. 18, August 31, 1995 (Torbet, ALJ) ("if the Petitioners have by a simple preponderance of the reliable, probative and material evidence made a case which taken as a whole tends to show the truth of the Petitioners allegations, then they are entitled to recognition"). BIA's rules state, "Conclusive proof of the facts relating to a criterion shall not be required in order for the criterion to be considered met." 25 C.F.R. § 83.6(d). The Department revised its Part 83 regulations in 1994, in part to address disparities arising from the tendency of historical identifications to deny Indian ancestry. 59 Fed. Reg. 9280, 9286 (February 25, 1994).[4]

C. *The Administrative Proceedings Below.*

On August 14, 1979, the RMI filed with BIA a notice of intent to petition for federal recognition under the Part 83 procedures. The RMI conducted extensive research and submitted a petition. On March 5, 1992, BIA placed RMI's "revised" petition on "active consideration."[5]

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4 In many historical identifications, Indians were referred to simply as "colored," along with other non-White individuals.

5. Throughout the period of active consideration, representatives of Atlantic City casino gambling interests put enormous pressure on the BIA against recognizing the RMI as an Indian Tribe on the basis that if recognized, the RMI might seek to pursue a gambling enterprise that would create economic competition to Atlantic City gambling businesses. The RMI had begun the process of seeking BIA recognition years before the 1986 passage of the Indian Gaming Act that legalized Indian gaming.

On December 8, 1993, BIA issued a Proposed Finding, asserting that the RMI had failed to meet four of the seven mandatory criteria—community, political authority, descent from a Tribe, and viewed as an Indian entity.[6] On April 22, 1994, the RMI invoked its right pursuant to 25 C.F.R. § 83.3(g) to have its petition considered under the revised rules. On January 6, 1996, the BIA issued a Final Determination stating that the Tribe had failed to satisfy *three* of the seven mandatory criteria — community, political authority, and descent — and finding that the RMI had met the community and political authority criteria for the period 1870 to 1950.

The RMI appealed the negative determination to the Interior Board of Indian Appeals ("IBIA"). On January 18, 1997, IBIA affirmed BIA's decision, but asked the Secretary to reconsider four issues raised by the RMI. On January 7, 1998, the Secretary issued a Reconsidered Final Determination, affirming and "correcting" the BIA's Final Determination.

D. *The Judicial Proceedings Below.*

The RMI appealed the final agency action to the United States District Court for the District of Columbia. The RMI's complaint contended that the BIA had acted arbitrarily, capriciously and in violation of law and Constitutional right. As a remedy, the RMI asked the District Court to grant it recognition. At oral argument, Judge Robertson indicated he did not believe he had authority to recognize the RMI himself,

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6. This proposed negative determination had been announced by representatives of Atlantic City casino gambling interests (then-Congressman Robert Toricelli) several weeks earlier, on November 17, 1993, three weeks before it was signed by the Assistant Secretary.

but expressed his agreement that if he did remand the case to BIA, BIA would, after several more years, simply rubberstamp its earlier decision and the case would return to District Court.[7] The District court asked the RMI "would you want to be sent back to the BIA? Or do you want something in a posture that would enable you to take it to the Court of Appeals." *Id.* Ultimately, the court found that it lacked authority to recognize the tribe and issued an "appealable" order so the Court of Appeals could decide the matter.

In affirming the decision of the agency to deny recognition the District Court adopted BIA's findings, including its findings that the RMI was unable to prove descent. Nevertheless, the court observed that the BIA may have "rejected a great deal of information based on its own lack of knowledge about Native American history." Appendix C.

The Court of Appeals summarily affirmed BIA's "no descent" finding, although it did observe in dicta that RMI had made a persuasive case that BIA probably had failed properly to evaluate the community and political authority criteria, among other problems. During oral argument, BIA conceded that the RMI are Indians — "The Court: So the question of whether they're Indians at all is not on the table . . . They won that . . . Is that right? — Mr. Bryson: That's right." However, the Court uncritically and without analyzing the overwhelming evidence of descent in the record, accepted BIA's impossible burden of proof standard

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7. Transcript of Oral Argument, pg. 95-96 (RMI "has told me that a remand would be devastating; and I can well understand that a remand would be devastating because it would send this back to the BIA . . . it may very well be that if they just relooked at it through a different legal lens, they would come out the same way and it would be several years down the pike and everybody would still be waiting.")

REASONS FOR GRANTING THE WRIT

A. BIA IMPOSED AN IMPOSSIBLE BURDEN OF PROOF IN CONFLICT WITH THIS COURT'S DECISION IN *ALLENTOWN MACK SALES v. NATIONAL LABOR RELATIONS BOARD*

1. BIA Required Clear and Convincing Evidence where the Rules only Require Preponderance of the Evidence.

Although it is undisputed that the rules require the BIA to apply a "reasonable likelihood" standard (25 C.F.R. § 83.6(d)), in this case there is clear record evidence that the BIA applied a "conclusiveness" standard of review. This standard was *specifically* applied to the issue of tribal descent, and used by BIA to dismiss pivotal pieces of evidence. For example, in articulating her overall negative proposed finding with regard to criterion (e), Tribal descent, the Assistant Secretary concluded, "there is no *conclusive* evidence that these families are Indian, are 'of Indian descent' or have any affiliation with the tribes who resided in the New York-New Jersey area at the time of historic contact." AR000303 (emphasis added). Although the Assistant Secretary removed the word "conclusive" from her Final Determination, and stated that she was making her decision under the "reasonable likelihood" test, she failed to explain how the change in standard of review altered her analysis of the evidence. In fact, except for the word "conclusive" her analysis remained the same. AR000085, 88. Moreover, the BIA technical report accompanying the Final Determination, still expressed use of the conclusive standard in addressing whether the RMI ancestors were living in the Lenape/Delaware Indian community documented by Victor Jacquemont in 1827, concluding, "it is not *certain* that this was the case." AR000118 (emphasis added).

The District Court found the staff's use of the illegal "conclusive" standard "disturbing" but not persuasive, observing that the "BIA's Final Determination clearly states that the reasonable likelihood standard was applied overall." Appendix C, pg. 14a. In ending the analysis based on the standard that the Assistant Secretary *said* she applied, without analyzing what standard she *did* apply, the District Court failed to complete the review required under *Allentown Mack Sales v. National Labor Relations Board*, 522 U.S. 359, 375 (1998), where this Court stated, "The evil of a decision that applies a standard other than the one it enunciates spreads in both directions, preventing both consistent application of the law by . . . agency personnel . . . , and effective review of the law by the courts." Having promulgated regulations governing federal recognition the BIA is required to adhere to the requirements of those regulations. *Miami Nation of Indians v. United States*, 2001 U.S. App. LEXIS 13277 (7th Cir. 2001).

The Court of Appeals acknowledged that the RMI made "strong arguments" regarding the application of the wrong standard of law by the BIA, but declined to rule on that issue, noting that the RMI had presented "no evidence" of Tribal descent based on BIA's assertions to the court. Appendix A. The Court's reasoning suffers from circularity — a primary reason that the BIA was able to find "no evidence" of tribal descent was *because* BIA had applied an impossible and illegal standard in rejecting the RMI's evidence. The Court of Appeals failed to perform the minimum task of judicial review when it accepted uncritically BIA's impossible burden standard, failing to discuss the many items of descent evidence presented to the BIA and discussed by RMI in its briefs.

2. BIA Examined and Rejected Each Piece of Evidence in Isolation and Failed to Credit the Cumulative Weight of the Evidence.

The RMI's petition relies on numerous different pieces of evidence that corroborate each other and combine to demonstrate that the RMI meet the descent criterion — there is no single piece of evidence that makes the entire case. For example, the same individuals (and their descendants) living in the RMI Green Mountain Valley community at the time Victor Jacquemont documented Lenape Indians in the area in 1827, also appear on the rolls of Reverend Ford's church in the 1870's, were found to be Lenape descendants by the Vineland Study in 1911, and are mentioned by name in the Smithsonian Report during the 1940's. BIA, however, never analyzed how each separate piece of evidence corroborates and supports the other pieces, but instead simply assessed each piece separately, determined it provided no evidence of descent and dismissed it. This violates established law and the BIA's rules. § 83.6(d); *Greene v. Babbitt*, Case No. Indian 93-1, pg. 18, August 31, 1995 (Torbet, ALJ) (evidence must be reviewed "as a whole"). *See, e.g., Dickerson v. Zurko,* 527 U.S. 150 (1999); *Bourjaily v. United States*, 483 U.S. 171, 180 (1987) ("a piece of evidence, unreliable in isolation, may become quite probative when corroborated by other evidence.").

BIA stated its untenable rule of law to the District Court as follows: "Items of evidence which individually provide no evidence of tribal descent cannot, when considered cumulatively, provide reliable evidence of tribal descent."[8] The District Court refused to address this issue, asserting, "Evaluation of an agency's decision against the 'arbitrary and capricious' standard does not require analysis of whether, and how, the agency treated

8. BIA Reply Brief to District Court, pg. 45 (June 30, 2000).

each piece of evidence, or whether it properly used one piece of evidence to corroborate another." Appendix C, pg. 24a. The District Court was mistaken. This issue requires a hard look *de novo* as it involves the BIA's failure to follow its own rules requiring consideration of the evidence "as a whole". 5 U.S.C. § 706(2)(D); *Allentown Mack Sales*, at 374 ("it is hard to imagine a more violent breach of [the reasoned decision-making requirement] than applying a . . . standard of proof which is in fact different from the rule or standard formally announced. And the consistent repetition of that breach can hardly amend it.")

It was only by refusing to credit the cumulative weight of RMI's evidence that BIA could find, and the courts below could uncritically accept, that RMI had presented *no evidence* of descent. In adopting BIA's contention on this pivotal matter and issuing a ruling based on BIA's invalid finding — i.e., RMI had no evidence of descent — the Court of Appeals implicitly approved BIA's failure to follow established law requiring consideration of the evidence as a whole.

3. BIA Refused to Make Reasonable Inferences Based on the Evidence.

This Court has held that an administrative agency *must* accept all inferences the evidence fairly demands — an agency "is not free to prescribe what inferences from the evidence it will accept and reject, but must draw all those inferences that the evidence fairly demands. 'Substantial evidence' review exists precisely to ensure that the [agency] achieves minimal compliance with this obligation, which is the foundation of all honest and legitimate adjudication." *Allentown Mack Sales*, at 378-379. BIA however refused to

make reasonable inferences from the evidence before it. For example, the combination of Reverend Ford's identification of the RMI mountain community of the 1870's as "Indian", in conjunction with the 1876 Bergen County history documenting "Hackensacky" Indians — which was a band of the Lenape — in the mountains, leads to a reasonable inference that the RMI were Lenape Indians. The fact that Lenape Indians are the only Indians ever to have occupied the area, demands a similar inference. BIA's refusal to make these inferences is indefensible under *Allentown*, particularly in light of the fact that there is *no contrary evidence in the record* that might dispel these inferences.

The Court of Appeals upheld BIA's refusal to make reasonable inferences, in violation of *Allentown*, stating, "this court cannot conclude that the Secretary . . . clearly erred in refusing to make the inference[s] urged by RMI. . . ." Appendix A, pg. 2. The Court of Appeals' failure to require BIA to make reasonable inferences was clear error, as was its review of this issue under the *clearly erroneous* standard.

Part of the basis for BIA's refusal to credit the Lenape ancestry of the RMI was its erroneous contention that all of the Lenape had been *removed* by the so-called Treaty of Easton in 1758. AR000284; AR020179. The RMI demonstrated to the courts below that the Treaty of Easton was not a removal document. But even with this fundamental flaw in the BIA's reasoning revealed, the Court of Appeals still declined to require the BIA to make reasonable inferences, and uncritically adopted BIA's assertion that there was "no" evidence of descent among the 30,000-page Administrative Record.

4. BIA Imposed Non-Existing "Earliest Ancestor" and Primary Source Rules.

On the plain face of BIA's rules, the descent criterion can be established with evidence that "present members or ancestors of present members" have been identified as descending from a historical Indian Tribe. § 83.7(e)(1)(i)-(v). Of particular significance under the rules are Federal or State reports. § 83.7(e)(1)(ii). Thus, the 1940's Smithsonian Report that names particular RMI family lines and identifies the RMI as a continuation of the historical Lenape tribe, should be counted as significant evidence of descent. BIA gave no credit to the report, and instead demanded that the RMI provide primary source evidence contemporaneous with its earliest 18th century ancestors identifying those individuals as members of a historical Indian tribe. AR000085, 88. In other words, BIA demanded an 18th century base roll, similar to those made by Federal agents for many western tribes during the late 19th century.[9] This requirement clearly violated the plain language of the descent criterion; the BIA's decision must be reversed under *Allentown*. While the District Court specifically upheld the BIA's use of its ersatz primary source rule, the Court of Appeals observed, "We agree that RMI has presented strong arguments regarding the Secretary's . . . occasional application of a primary-source rule. . . ." Appendix A. As noted, however, the Court of Appeals still upheld the BIA's decision based BIA's finding, uncritically adopted by the court, of "no" evidence of descent. The court's ruling suffers from circularity — i.e., BIA used the improper primary source and earliest ancestor rules to reject RMI's evidence of descent. Thus, BIA's use of these unlawful rules was clear error.

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9. BIA Brief to Court of Appeals, pg. 33-34.

5. BIA Ignored Established Laws of Descent.

The decision of the Court of Appeals is particularly egregious because it allows the BIA to ignore long established legal precedents embodied in the BIA's own regulations and interpretative public notice and to rewrite the law of descent as applied to Native Americans. BIA states in the RMI case, "[T]he standards used by the BIA to evaluate evidence do not differ from those universally accepted by genealogists" (AR000111). According to the BIA "these are the rules of evidence applied in court proceedings involving pedigree, ancestry or heirship cases . . ." (AR000113). However, these legal precedents were ignored by the agency in its finding of "no evidence" of tribal descent.

In sharp contrast to its actual *use* of a "conclusive" standard in reviewing RMI tribal descent, the BIA pays lip-service to the truth that in establishing descent, "CONCLUSIVE PROOF is not possible . . . It is impossible to "prove" ancestry to an absolute certainty." AR000112. BIA nonetheless went on to reject evidence of descent, observing that BIA cannot base its decision on "hearsay," or traditional evidence. AR006672-74. It is universally understood by genealogists that virtually all available genealogical documentation is in fact "hearsay" (AR000113). This hearsay evidence is acceptable under all established legal precedents and should have been given strong probative weight by the BIA. *Fulkerson v. Holmes*, 117 U.S. 389, 397 (1886). *See also Ware v. Beach,* 322 P.2d 635, 639-640, *cert. denied*, 358 U.S. 819 (1958). ("Evidence as to the general reputation in the community concerning the race of a member of the community is competent.") Federal Rules of Evidence, Rule 803(19) authorize evidence of heritage based on "Reputation among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, concerning a person's . . . ancestry, or similar fact

or personal or family history." Likewise, evidence of heritage is acceptable under Rule 803(21) based on "Reputation in a community, arising before the controversy, as to . . . reputation as to events of general history important to the community or State or nation in which located."

The RMI presented numerous family, eyewitness and historical accounts of "ancestors of present tribal members" as being Lenape descendants. Moreover, these descendents traced back to the "first known" RMI ancestors. However, the BIA systematically and unlawfully rejected this strong evidence of descent under criterion (e) because it was based on "hearsay" and/or failed to prove the issue of descent "conclusively." Given, the clear error of the Court of Appeals in allowing the BIA to ignore the law of descent as embodied in its own regulations and interpretive guidelines (Appendix H), this Court should intervene. *United States v. Mid-Continent Petroleum Corp.*, 67 F.2d 37, 45 (10th Cir. 1947) (General reputation evidence is not only acceptable, but is highly credible).

6. BIA Imposed a Higher Burden of Proof on RMI for Establishing Indian Ancestry than BIA Used for Finding Afro-Dutch Ancestry.

While BIA rejected Lenape descent for the Defreese line based on what it found to be a one generation gap between the Tappan/Lenape Indian John Defries and subsequent RMI ancestors, BIA applied a much more lenient standard to identify African ancestry for the Tribe. For example, BIA offered two possible alternative ancestors for the Defreese line: "a Dutch sea captain (Jan de Vries), and a 'free Negro' (John DeVries)" and asserted that these were "equally possible" ancestors.[10] This observation makes no sense, and violated genealogical

10. BIA Brief to Court of Appeals, pg. 36.

methodology. BIA failed to disclose that the Dutch sea captain was living in New York City during 1640-1650, a century earlier, while the "free Negro" was living in New York City in 1703, and there is no evidence that either of them or their descendants ever migrated to the Ramapough mountain area. AR000470. Similarly, in the Van Dunk line, BIA was perfectly willing to bridge a multiple-generation gap back to a New York City "free Negro" on 17th century records. AR006538. BIA's use of this double standard imposes an invalid racial distinction, and must be rejected.

B. THE COURT SHOULD EXERCISE ITS SUPERVISORY POWERS BECAUSE OF THE OVERWHELMING IMPORTANCE OF THE ISSUES PRESENTED BY THIS CASE.

The RMI petition is only the third case to reach the appellate stage under the BIA's acknowledgment rules. There are several hundred petitions pending before BIA, most of which will likely be appealed to the Federal Courts because of the importance of Federal recognition and the chaos that characterizes the decision-making process at BIA.

The court in the Samish Indian Tribe case criticized BIA's decision-making process as biased and unreliable, and ordered special independent fact-finding procedures and heightened due process on remand, ultimately leading to Tribal recognition. *Greene v. Babbitt*, No. C89-645Z (Dist. Ct. W.D. Wash. October 15, 1996). During on-the-record testimony on remand, the BIA admitted it consistently applied an unlawfully burdensome standard of proof. *Greene v. Babbitt*, Case No. Indian 93-1 (1995).

The General Accounting Office recently concluded that the BIA's recognition process is seriously flawed.[11] Among the GAO's findings was that the BIA "continues to struggle with the question of what level of evidence is sufficient to meet criteria in recognition cases. The lack of guidance . . . creates controversy and uncertainty . . ." GAO Report, at 10. The Report also found that while the agency states that it "will continue to apply the precedents established in past decisions . . . it is not clear what they are or how that information is made available to petitioners." GAO Report, at 14. The GAO report was prompted in large part by local citizens and various states who believe that the BIA's recognition process lacks standards and thus has lead to a number of tribes being recognized primarily because they have deals with casino interests. The current Assistant Secretary for Indian Affairs, Neal McCaleb, has acknowledged that the process is flawed and has made it a goal to improve "this important federal function to serve Indian tribes." *Id.*

During 2000, the previous Assistant Secretary, Kevin Gover, testified to Congress that BIA's recognition process is irreparably broken, and asked Congress to take away BIA's authority to recognize Tribes and lodge it with an independent Commission.[12] Congress has struggled for years, and has been unable to come up with any alternative. It is undisputed that the BIA process has broken down with inconsistent and prejudged decisions outside the legal standards of the APA. *See United States Of America v. 43.47 Acres of Land, United*

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11. United States General Accounting Office, GAO-02-49, "Improvements Needed in Tribal Recognition Process", November 2001, "GAO Report".

12. "Tribes and Tribulations: BIA Seeks to Lose a Duty," Washington Post, June 2, 2000, pg. A31.

States District Court for the District of Connecticut, 2000 U.S. Dist. LEXIS 14289 (D.C. Conn. 2000) "Mr. Gover, (Assistant Secretary Indian Affairs) who is in charge of the recognition process, admitted that the BAR process has broken down and he admitted that the current administration would be unable to reform it.")

John A. Shapard, Jr., the former BAR Chief and principal author of the Part 83 regulations, has stated that the RMI petition is one of the strongest ever presented (AR006761), and that BAR staff were biased against the RMI based on a hidden policy preference, expressly contrary to the no minimum blood quantum rule, that the RMI are not sufficiently "Indian" to deserve formal Federal recognition due to a perception that they have mixed-race ancestry.[13]

Shortly after the final decision on the RMI petition, BIA abandoned the BAR staff's unfair dual role of judge and adversary inflicted on RMI, by conceding that the staff should no longer compile lengthy technical reports in an effort to rebut petitioner's submissions, but should base decisions on outside submissions alone. 65 Fed. Reg 7052 (February 11, 2000). *See also* "Why Does it Take So Long?: Federal Recognition and the American Indian Tribes of New England, by Jack Campisi and William Starna, *Northeast Anthropology*, No. 57 (Spring 1999):

> The criteria that appear in the regulations . . . are so imprecise as to be unusable in any legitimate anthropological or historical analysis; . . . the professional staff [at BAR] was not in the past, and is not today, sufficiently knowledgeable or

13. Declaration of John A. Shapard, Jr., July 27, 2000.

> suitably trained to make competent decisions regarding the status of American Indian communities; and . . . the application of the criteria by these same staff members has been idiosyncratic and often contradictory.

After more than twenty years of a failed federal recognition process the time is ripe for this Court to address the appropriate standards of agency review in these cases of great national importance. The decisions of the District Court and of the Court of Appeals are so overly deferential that the BIA will have almost unlimited power in rejecting or recognizing tribes if this Court does not act.

BIA used the impossible burden of proof standard against the RMI in an attempt to achieve administrative genocide. Such absolute power in the hands of the BIA in recognition decisions has the inevitable result of granting and denying recognition based solely on political influence, economic (e.g., gambling) concerns, and invalid racial classifications. This Court should intervene to address the appropriate standard for agency and court review of recognition cases. The Court's decision in this case will have far reaching consequences, eventually impacting hundreds of petitioning tribes, millions of local citizens and numerous states concerned with that the recognition process should function in a fair, orderly and reliable manner.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — MEMORANDUM AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT DATED AND FILED DECEMBER 11, 2001

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 00-5464 **September Term, 2001**
(No. 98cv02136)

Ramapough Mountain Indians and Silent Wolf, Chief, Ramapough Mountain Indians,

Appellants

v.

Gale A. Norton, Secretary, United States Department of the Interior, et al.,

Appellees

Appeal from the United States District Court for the District of Columbia

Before: GINSBURG, *Chief Judge*, and ROGERS and GARLAND, *Circuit Judges*.

MEMORANDUM

The Ramapough Mountain Indians, Inc., ("RMI") is a group of people living on the New York and New Jersey border who in 1979 filed a petition for federal recognition as

an Indian Tribe. In 1993 the Bureau of Indian Affairs issued a Proposed Finding denying federal recognition. Subsequently, a Final Determination was issued in 1996. The Interior Board of Indian Appeals affirmed the denial in significant part while remanding for reconsideration of several issues. In 1998 the Assistant Secretary for Indian Affairs ("the Secretary") issued a Reconsidered Final Determination also denying the petition. RMI then sought reversal in the district court, which granted summary judgment to the Secretary. On appeal, RMI contends that the Secretary erred in a number of significant ways in reaching the decision to deny its petition.

Under the regulations for recognition as an Indian Tribe, the petitioner is required to meet each of seven criteria. Mandatory criteria for Federal acknowledgment, 25 C.F.R. §§ 83.7(a) - (g). Upon consideration of RMI's contentions and a review of the record, we hold that the Secretary permissibly concluded that the evidence presented by RMI to establish that it met criterion (e) is too limited. Although criterion (e) — which requires the petitioner to show that its membership consists of individuals who descend from an historical Indian tribe — allows a wide range of evidence to show that the criterion is satisfied, *section 83.6* of the regulations requires "thorough explanations and supporting documentation" and permits the denial of a petition "if there is insufficient evidence that it meets one or more of the criteria." 29 C.F.R. § 83.6(c), (d). The Bureau of Indian Affairs elaborated on these standards when it stated that "a criterion is not met if the available evidence is too limited to establish it, even if there is no evidence contradicting facts asserted by the petitioner." Procedures for Establishing that an American Indian Group Exists as an Indian Tribe, 59 Fed. Reg. 9280, 9280 (Feb. 25, 1994) (codified at 25 C.F.R. pt. 83).

Appendix A

Here, the Secretary refused to make an assumption of specific tribal ancestry on the basis of 19th and 20th Century descriptions of RMI ancestors as Indian because RMI provided no documentation that these ancestors "descended from any known historical tribe of North American Indians." RMI does not contest that it is unable to provide such documentation; rather, RMI maintains that the Secretary had circumstantial evidence from which it could reasonably be inferred that there was a tribal connection. *See* Appellants' Reply Br. at 27 ("[I]t is likely that these "Indian" identifications indicate Lenape Tribal descent. Indeed, BIA found that no other Tribal group had migrated to the Ramapough Mountains. Thus, the only reasonable conclusion is that RMI descend from the Lenape Indians."). Because the regulations require some documentation of tribal descent and RMI has provided none, this court cannot conclude that the Secretary was arbitrary and capricious in requiring documentation or clearly erred in refusing to make the inference urged by RMI where the evidence was as limited as it was.

We agree that RMI has presented strong arguments regarding the Secretary's failure to apply the nonautomatic provisions of criterion (b), her refusing to accept RMI's endogamy study covering the pre-1870 period, her unexplained alteration of the time period during which RMI satisfied criterion (b) and accompanying failure to notify RMI of such change, her consideration of 19th Century geographical and genealogical evidence, the occasional application of a primary-source rule, and the application of an inappropriate conclusiveness standard at various points of her analysis. We affirm, however, without reaching those

issues because to receive federal recognition RMI had to demonstrate that it met all seven of the criteria in section 83.7, and the Secretary reasonably concluded that criterion (e) was not satisfied. 25 C.F.R. § 83.6(c).

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 00-5464 **September Term, 2001**
(No. 98cv02136)

Ramapough Mountain Indians and Silent Wolf,
Chief, Ramapough Mountain Indians,

Appellants

v.

Gale A. Norton, Secretary, United States
Department of the Interior, et al.,

Appellees

Appeal from the United States District Court
for the District of Columbia

Before: GINSBURG, *Chief Judge*, and ROGERS and GARLAND, *Circuit Judges*.

JUDGMENT

This appeal was considered on the record from the United States District Court for the District of Columbia and on the briefs and oral argument of the parties. The court has determined that the issues presented occasion no need for a published opinion. *See* D.C. Cir. Rule 36(b). For the reasons stated in the accompanying memorandum, it is

Appendix A

ORDERED AND ADJUDGED that the district court's Memorandum Opinion and Order granting summary judgment to appellees is hereby affirmed.

The clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: s/ Michael C. McGrail
Michael C. McGrail
Deputy Clerk

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA DATED OCTOBER 24, 2000 AND FILED OCTOBER 25, 2000

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 98-2136 (JR)

THE RAMAPOUGH MOUNTAIN INDIANS
and CHIEF SILENT WOLF,

Plaintiffs,

v.

BRUCE BABBITT, Secretary,
U.S. Department of the Interior, et al.,

Defendants.

ORDER

Defendants' motion for correction and clarification points out two mistakes in my September 30, 2000, memorandum opinion and asks that I issue a revised version to correct them. Plaintiffs respond that this is a "tactical submission intended to 'fix' what [defendants] find inconvenient . . . *vis a vis* [BIA's] other recognition decisions and court cases." Whatever the merits, or motives, of either side's position, a corrected opinion will not issue. The errors are acknowledged, but they do not affect my ultimate conclusion that the BIA neither failed to adhere to its own

regulations or acted arbitrarily, capriciously, or in violation of any law. Because any appellate review of this court's decision will be de novo in any event, it is this 24th day of October 2000

ORDERED that the motion for correction and clarification is **denied**.

s/ James Robertson
JAMES ROBERTSON
United States District Judge

APPENDIX C — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA DATED AND FILED SEPTEMBER 30, 2000

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 98-2136 (JR)

THE RAMAPOUGH MOUNTAIN INDIANS
and CHIEF SILENT WOLF,

Plaintiffs,

v.

BRUCE BABBITT, Secretary,
U.S. Department of the Interior, *et al.*,

Defendants.

MEMORANDUM

This is an action for judicial review of the Bureau of Indian Affairs's ("BIA") decision not to recognize plaintiffs Ramapough Mountain Indians ("RMI") as an Indian tribe. RMI's complaint asserts many deficiencies in the BIA's decision-making process. The BIA has moved for summary judgment. For the reasons set forth below, that motion will be granted.

Appendix C

Background

The RMI number about 2600 individuals who claim to be descendants of Native Americans, specifically the historic Munsee tribe. The majority of the members of this group currently reside near the Ramapough Mountains on the New York/New Jersey border. They incorporated in 1978 and, in 1979, requested federal recognition as an Indian tribe pursuant to 25 C.F.R. § 83.

After a lengthy administrative process the BIA found no connection between the Munsee Indians and the RMI and concluded instead that the RMI are descended from Afro-Dutch families who lived in Manhattan until the 1700s and then migrated to northeastern New Jersey and Tappan, New York. According to the BIA, the Munsee lived in the Ramapough Mountains until 1758, when they were removed with all other New Jersey Indians pursuant to the Treaty of Easton. The RMI submit that the Treaty of Easton did not apply to their Munsee ancestors and that it was not a removal document. The BIA nevertheless finds that the ancestors of the RMI lived thirty miles from the Ramapough Mountains in 1758 and did not move to the Ramapough Mountain area until thirty years after the Munsee were removed. The BIA's conclusion is that the RMI cannot be descended from the Munsee tribe.

Procedural History

On August 14, 1979, the RMI filed a letter of intent with the BIA indicating their desire to proceed with recognition procedures pursuant to 25 C.F.R. § 83. This letter was

prompted by the publication of *The Ramapough Mountain People*, a monograph that denounced the RMI's Native American identity and culture. After more than ten years of research, the RMI filed supporting documentation on April 23, 1990. Two months later, the BIA requested additional information, which RMI provided on January 28, 1991.

The BIA placed the RMI's revised petition on active consideration on July 14, 1992. On December 2, 1993, the Assistant Secretary of the Interior (Assistant Secretary) signed a Proposed Decision, finding that the RMI had failed to meet four of the seven mandatory criteria, specifically 25 C.F.R. § 83.7(a), (b), (c), and (e), set forth in the 1978 regulations. Two weeks *before* the issuance of that Proposed Decision, then-Congressman Toricelli announced at a press conference that the RMI would be denied recognition.

The RMI exercised their right under 25 C.F.R. § 83.3(g) to seek reevaluation. On January 6, 1996, the Assistant Secretary signed a Final Determination, finding that the RMI had failed to meet *three* of the seven mandatory criteria — subsections (b), (c), and (e). The RMI appealed this Final Determination to the Interior Board of Indian Affairs. The IBIA affirmed the Assistant Secretary's Final Determination on January 18, 1997, but asked that the Secretary of the Interior reconsider four specific issues raised by the RMI. The Assistant Secretary reconsidered those issues and, on January 7, 1998 released a Reconsidered Determination, essentially affirming the BIA's Final Determination. The RMI subsequently filed this action for judicial review.

Appendix C

The RMI request various forms of relief, but they state no claim for which relief can be granted except under the Administrative Procedure Act, 5 U.S.C. § 706(2). Contrary to RMI's suggestion, I have no authority to conduct a de novo review, grant recognition, order the BIA to grant recognition, or retain jurisdiction. If the agency's action was arbitrary and capricious, violated the plaintiffs' constitutional rights, or followed procedures contrary to law, the only remedy is an order vacating the Final Determination and remanding the case to the BIA for reconsideration.[1]

Analysis

Following procedures established by departmental regulations issued in 1978, 25 C.F.R. §§ 83.1-83.13, the BIA may grant federal recognition to a tribe, thereby creating a government-to-government relationship between the tribe and the United States and making the tribe eligible for special services and benefits available only to federally recognized tribes. *See id.* (citing to 25 C.F.R. § 83.2 (1994)).

The RMI asserts that the BIA failed to adhere to its own regulations. I must closely examine allegations of procedural violations. *See NRDC v. SEC*, 606 F.2d 1031, 1048 (D.C. Cir. 1979). If the BIA did in fact violate their own procedural regulations, its decision must be vacated. *See* 5 U.S.C. § 706(2)(d); *New York State Energy Research & Dev. Auth. v. FERC*, 746 F.2d 64, 66-69 (D.C. Cir. 1984).

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1. At oral argument, the RMI urged the Court *not* to remand the case, stating a clear preference for an appealable order.

Appendix C

RMI's challenges to the substantive aspects of the BIA's determination, however, may only be disturbed if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(a). This is a deferential standard, but it is not so lenient that "the presumption of regularity . . . shields the Secretary's action from a thorough, probing review." *Overton Park*, 401 U.S. at 415. A three-part test governs the review of substantive aspects of agency decisions. The reviewing court must (1) ascertain the facts on which the agency relied in making its decision; (2) determine whether those facts have some basis in the record; and (3) judge whether a reasonable decision maker could respond to those facts as the agency did. *See Recording Indus. Ass'n v. Copyright Royalty Tribunal*, 662 F.2d 1, 8 (D.C. Cir. 1981).

With those principles in mind, I must examine each of the ten alleged deficiencies in the BIA decision that the RMI alleges were not only arbitrary and capricious, but also contrary to law. As a finding for the RMI on any one of the procedural claims would mandate a remand, these claims will be discussed first, before reaching RMI's arguments regarding the reasonableness of the BIA's final determination.

1. *The BIA's Decision Was Subject to Prejudgment*

The only proffered support for this claim is that then-Congressman Toricelli announced the outcome before the decision was actually signed. This fact, while disturbing, does not establish or even tend to establish prejudgment. The BIA had already drafted the Proposed Decision and provided it to the Assistant Secretary for final approval. The congressman's foreknowledge indicates that there was an improper leak of information but does not show prejudgment.

Appendix C

2. *The BIA Applied the Wrong Standard of Proof*

The RMI claim that the BIA required them to prove many facts and elements of their petition with certainty when the proper standard of proof is only a "reasonable likelihood," or "preponderance of the evidence." 25 C.F.R. § 83.6(d). As evidence of their allegation, the RMI present the sworn testimony of former BAR Chief Holly Reckord, who admitted in 1995 (two years after the Proposed Decision was signed by the Assistant Secretary, but before the IBIA appeal) that BAR staff apply the *prevailing standard in their professions* (anthropology, genealogy, history, etc.) rather than the correct legal standard.

This evidence, too, is disturbing, but it is insufficient without more to prove that the BIA applied impermissibly strict standards in a specific case. The BAR staff provide technical reports to the BIA and do not themselves reach conclusions or make recognition determinations. Thus, to show that the BAR staff used a particular standard does not prove what standard the BIA ultimately applied. The BIA's Final Determination clearly states that the reasonable likelihood standard was applied overall to the BMI petition.

The RMI makes a specific claim with respect to the BIA's evaluation of criterion (e), descent from a historical Indian tribe, that requires further discussion. BIA regulations allow this requirement to be satisfied with "State, Federal, or other official records or evidence identifying present members or ancestors of present members as being descendants of a historical tribe," "church, school, and other similar enrollment records," "affidavits of recognition by tribal

elders, leaders, or the tribal governing body," or "other records or evidence identifying present members or ancestors of present members as being descendants of a historical tribe." 25 C.F.R. § 83.7(e)(1)(ii-v). RMI asserts that BIA improperly rejected its proffer of "other . . . evidence" to satisfy this criterion, insisting on "primary source" documentation, and that it was unlawful for BIA to reject materials such as letters and excerpts from books and pamphlets that would qualify under §§ 83.7(a)(4) and (a)(5).

This RMI argument conflates the requirements of proof for criterion (a), identification of the petitioner as an American Indian entity on a substantially continuous basis since 1900, with the requirements of proof for criterion (e), membership consisting of individuals who descend from a historical Indian tribe. The works of anthropologists, historians and other scholars, as well as newspapers and books, are acceptable to satisfy the *identification* requirement of criterion (a), but *records* are required to satisfy criterion (e). The types of evidence listed under criterion (e) as acceptable to prove its *ancestry* requirement would be recognized under the rules of evidence as admissible under exceptions to the hearsay rule: *records* of regularly conducted activity, public *records* and reports, *records* of religious organizations, marriage, baptismal and similar *certificates*, family *records*, *see* F.R.Evid. 803 (6), (8), (11), (12), (13). Anthropologists, scholars, and authors are acceptable on the subject of *identification*, but not to prove *ancestry*.

Appendix C

3. *The BIA Failed to Follow Its Own Rules*

The RMI allege that the BIA failed to follow its own rules in many respects. Failure of an agency to follow its own rules is arbitrary and capricious behavior and mandates a remand to the agency for reconsideration. *See Cherokee Nation of Oklahoma v. Babbitt*, 117 F.3d 1489, 1499 (D.C. Cir. 1997). I must therefore address each of these allegations in turn.

a. *The BIA misapplied historic racial labels*

The RMI allege that the BIA misapplied historic racial labels (Black, Negro, Mulatto, Colored, FPC, etc), in contravention of the clear intent of the 1994 regulations. *See* 59 Fed. Reg. 9286, AR000630. The BIA's response is that, "while being labeled 'mulatto' or 'colored' by the census taker does not rule out Indian ancestry, it does not demonstrate it in the absence of other supporting evidence." Def.'s Mot. for Summ. J. at 45.

This issue presents a re-play of the arguments discussed forth above. The RMI assert that the BIA's refusal to accept unofficial records was contrary to 25 C.F.R. § 83.7(e)(v), and imposed an impossible standard on them, because official records initially did not allow for the classification as "Indian," and later did not require it, so that identifications were based on the whims of the census takers. But, again, the RMI position ignores the distinction between proof of ancestry and proof of external identification. RMI's examples — Tena Gertrude, Def.'s Ex. 3, AR000478, and Florence Maguiness, *id.*, AR000212 — would not satisfy the proof of descent required by criteria (e) even if their identification as Indian had been accepted.

b. *The BIA failed to take into account Revolutionary War document destruction*

The RMI next allege that the BIA failed to "take into account historical situations and time periods for which evidence is demonstrably limited or not available." 25 C.F.R. § 83.6(e). The RMI claim that many of the historical records in the area of the Ramapough Mountains were destroyed during the Revolutionary War, rendering it difficult to trace their Indian ancestry to specific, aboriginal ancestors before that time. They claim that the BIA used this lack of evidence against them, in violation of § 83.6. The BIA claims that no such document destruction ever occurred, and that plenty of information is available from that time period.

The RMI do not suggest what evidence they might have produced had the alleged distruction never occurred, or how it might have helped their case, or in what way the BIA held such a lack of evidence against them. The RMI have not carried their burden of demonstrating that evidence was "demonstrably limited or not available."

c. *The BIA refused to allow the RMI an on-the-record hearing*

Title 25, Section 83.10(j)(2) of the Code of Federal Regulations requires the Assistant Secretary to hold, at petitioner's request, a formal meeting on the record for the purpose of inquiring into the reasoning, analyses, and factual bases for the proposed finding. The RMI insist that they requested such a meeting, but that the BIA refused it and failed to give a reason for the refusal. The BIA, on the other

hand, states that the RMI expressed a preference for a conference with BIA researchers in a less formal setting and effectively abandoned their request for a formal on-the-record meeting.

The RMI have presented no evidence supporting their allegations, but the BIA has submitted a copy of a letter that it sent to the RMI, granting RMI's request for a formal meeting and explaining the procedures. The letter and the regulations imposed upon the RMI the obligation to draft an agenda for the meeting and to give notice to all interested parties. Because the RMI never drafted an agenda or gave notice, they effectively abandoned their request. I find no procedural violation.

d. *The BIA failed to disclose information in the Administrative Record*

The RMI allege that the BIA failed to disclose information in the AR, in violation of 25 C.F.R. § 83.10(j)(1). ("The Assistant Secretary shall make available to the petitioner in a timely fashion any records used for the proposed finding not already held by the petitioner, to the extent allowable by Federal law.") *See also Connecticut Light and Power v. NRC*, 673 F.2d 525, 530 (D.C. Cir. 1982) (stating that agency must consider and disclose the information it relies on).

Upon reviewing the administrative record filed by the BIA in this case, the RMI discovered documents that they claim had never been made available to them before. Some of these documents, referred to by the RMI as the "Manes

Indian deeds," allegedly enable the RMI to document their ancestry back to a Lenape Indian named Manes and his two sons, Arie and Peter Manes, who lived in the Ramapough Mountains during the 18th century.

The RMI also found a portion of the Treaty of Easton, which the BIA had specifically denied was a part of the AR. (The parties disagree as to the extent of the BIA's reliance upon the Treaty of Easton in the Final Determination, but they agree that the BIA consulted secondary sources about the Treaty and not the actual treaty.)

The alleged omissions of the Treaty and the Manes Indian deeds from the initial AR disclosures did not violate 25 C.F.R. § 83.10(j)(1) unless the contested documents were "used" in the Proposed Finding, and the RMI do not allege that the Manes Indian deeds were used in the Proposed Findings. They do assert that the BIA relied heavily upon secondary sources describing the Treaty and its effects, but there is no claim that the BIA failed to disclose their secondary sources. The BIA had no duty to disclose documents that were not "used" in the Proposed Findings.

4. *The Agency Disregarded Evidence*

The RMI allege that the BIA disregarded or ignored the findings and conclusions of its own staff, 18th Century Lenape Indian history, the Treaty of Easton, and the Manes Indian deeds, and that it discounted or rejected each piece of evidence that most strongly supported the RMI's case in an arbitrary and capricious way.

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An agency acts arbitrarily and capriciously when it ignores studies and data in its own files. *See Consumer Alert v. NHTSA*, 956 F.2d 321 (D.C. Cir. 1992). The BIA insists that it carefully considered each piece of evidence submitted by the RMI. I must therefore examine the RMI's specific allegations.

a. *The BAR's findings and conclusions*

The RMI claim that in order to find that it had not demonstrated community from historical times to the present (criterion (b)), the BIA necessarily had to ignore or disregard findings made by its own BAR researchers. For example, the RMI point to: (1) the BAR anthropologist's concluding remarks that state that the RMI community has existed as an isolated community for nearly 200 years, *see* Gov. Ex. 7, AR000449; (2) the BAR historian's statement that "[t]he petitioning group does represent a distinct community with significant continuity from the early 19th century to the present," Gov. Ex. 6, AR000307; and (3) the BAR genealogical report's conclusion that "[t]he RMI consists of a group of people who have lived along the border of northern New Jersey and southern New York for more than 200 years. A core group is found in the Ramapough Mountains, but many families live and/or work in the surrounding area." Gov. Ex. 8, AR000461.

None of these conclusions is necessarily inconsistent with the BIA's finding that the RMI failed to demonstrate community from historical times. The quoted statements are perhaps necessary, but they are not sufficient, to satisfy criterion (b). The BIA's conclusion as to criterion (b) does not establish that the anthropological, genealogical and historical statements were ignored.

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The RMI also assert that the BIA ignored the findings of Steve Austin, the BAR staff anthropologist, who was the only BIA representative ever to visit the RMI community. After spending two weeks among the RMI conducting research, Austin participated in a recorded interview. He remarked on the closeness of the RMI community, finding it interesting that even those RMI who have moved away from the core area maintain ties through marriage, family, and other forms of association. In his report to the BIA, Austin wrote that many RMI members living outside the core maintain relations with their natal community, marry other RMI, and visit the core frequently. *See* Gov. Ex. 7, AR000450. He concluded that "a community currently does exist among the RMI . . ." based on evidence that half of their membership lives within the core and interacts on a frequent basis, and that there are significant social and economic ties between RMI members in the three core communities, based on intermarriage and kinship. *See id.*; AR 000441.

These statements are not fatally inconsistent with the BIA's Final Determination. Some evidence of community is not necessarily enough evidence of community. The RMI have not established that the BIA ignored the BAR's findings and conclusions, only that the BIA disagreed with them.

b. *18th Century Lenape History*

The RMI allege that the BIA's representations regarding the early Lenape demonstrate that the BIA did not consult eighteenth century Lenape Indian history. The RMI do not allege that the BIA overlooked any specific document, but rather that the BAR historian's inadequate background in

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American history led her to reach several incorrect conclusions about the 18th century Lenape. The RMI claim that because the BIA decision relied in part on these conclusions about early Lenape history, which were factually incorrect and unsupported in the record, it is arbitrary and capricious.

The BIA responds that, while it was fully aware of Lenape history and political organization, it reached no conclusions regarding the Lenape and did not rely on what the RMI regards as misconceptions. The BIA indeed asserts that Lenape history is irrelevant to its decision because the RMI did not trace its ancestry to the Lenape. Instead, the BIA found that it was not clear which historical tribe, if any, the RMI were descendants of. Various sources mentioned different possible precursors, including the Munsee, Minisink, Tuscarora, Creek, Lenape, Hackensack, and Delaware. The RMI insist that all of these tribes, except for the Creek and the Tuscarora, are Lenape. The Munsee, Minisink and Hackensack are all names for various bands of Lenape, and the Delaware was the name given to the Lenape who left their homelands in the eighteenth century. The Tuscarora allegedly passed through the area during their northern migration in the early eighteenth century, and some of them may have blended with the Lenape living there. The Creek never lived in the area, and the RMI have never claimed Creek ancestry. The only mention of the Creek ancestry is a reference by a reporter interviewing Squire Christy in the 1890s. The RMI suggest the reporter may have been confused by the nineteenth century settlement of the RMI called Fyke Creek.

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The BIA did apparently rely heavily on the fact that tribal identifications in the record are inconsistent. If all of these tribal names are, in fact, consistent with Lenape heritage, the BIA rejected a great deal of information based on its own lack of knowledge about Native American history. In the absence of adequate proof of descent, however, the BIA's alleged ignorance is inconsequential.

c. *Various other documents*

The RMI allege that the BIA improperly rejected various other documents, including letters, local histories, and government reports. The record shows that the BIA considered each piece of evidence, and detailed its reasons for according more or less weight to the evidence. It is the duty and the prerogative of the BIA to evaluate the credibility of each piece of evidence, and to determine what weight the evidence should be afforded. Those discretionary decisions are entitled to deference on review.

5. *Failure to Consider Evidence in Light of the Totality of the Evidence*

The RMI argue that the BIA rejected each piece of evidence presented individually, as insufficient or inconclusive, and that it failed to comply with its own regulations requiring consideration of all bits and pieces in combination. *See* 25 C.F.R. § 83.7(a) ("evidence . . . may include one or a combination of the following, as well as other evidence"); 25 C.F.R. § 83.7(b)(1) ("This criterion may be demonstrated by some combination of the following evidence and/or other evidence. . . ."); BIA Guide, 59 Fed.

Reg. 9281 ("It has been the Department's experience that historical evidence of tribal existence is often not available in clear, unambiguous packets relating to particular points in time. More often, demonstration of historical existence requires piecing together various bits of information of differing importance."). The Court cannot conclude on this record that BIA failed to look at the evidence in combination. An agency's statement that it has "rejected" a piece of evidence may not necessarily mean that it found the evidence inadmissible. It may simply mean that it gave the evidence little or no weight. Evaluation of an agency's decision against the "arbitrary and capricious" standard does not require analysis of whether, and how, the agency treated each piece of evidence, or whether it properly used one piece of evidence to corroborate another.

6. *Inconsistent Application of Rules*

An agency acts arbitrarily and capriciously when it unjustifiably discriminates between similarly situated parties. *See Airmark Corp. v. FAA*, 758 F.2d 685, 691 (D.C. Cir. 1985). The RMI point to several ways in which the BIA's treatment of them was different from its treatment of other tribes.

The RMI claim that the BIA treated their application differently than those of other Delaware Indian tribes by requiring that they trace their ancestry back to a particular band of Lenape Indians. The RMI assert that none of the recognized tribes of Delaware Indians traces its lineage back to a distinct band and assert that the Delaware Indians all grew out of groups or bands that joined together, or individual

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Lenape Indians from many different bands that ended up living under a single leader. The RMI argue that in light of this, the BIA's insistence that each identification of the RMI's ancestors as "Indian" be accompanied by a specific tribal origin, and the BIA's refusal to consider evidence based on inconsistent tribal identifications, was unreasonable and unfair. The RMI provide no evidence for their claim that no federally recognized Delaware Indian tribe traces its heritage back to a distinct band, however. Nor do the RMI have an answer to the BIA's assertion that its decision was not based on the RMI's failure to trace their ancestry to a particular band of Lenape Indians and that indeed the RMI failed to trace their ancestry back to the Lenape in general.

The RMI further allege that the BIA required them to make a greater showing to meet criterion (c) than was required of the Jena Choctaw or the Gold Hill Indians. The RMI claim that they documented at least three separate families of Indians remaining in the area after the Treaty of Easton. Since the BIA granted recognition to the Jena Choctaw on the basis of the existence of two Indian families, and the Assistant Secretary determined in the Gold Hill case that just a single ancestor could be enough to meet criterion (c), the RMI insist that the BIA's finding was discriminatory and inconsistent. This argument oversimplifies the requirements of criterion (c), which addresses the maintenance of political influence or authority over members of a tribe since historical times. The number of members is only a small part of this criterion, not even mentioned in the regulations.

Finally, the RMI claim that they met the requirements for criterion (b) at a higher level than other Indian tribes previously

granted recognition. For example, the BIA recognized the Mohegan tribe based on the fact that 34% of their population was living in a ten mile radius core area, and 34% had some connection or ties to the core area. The United Houma Nation and the Nipmuc Nation were advised by BIA to use the Mohegan Model in preparing their petitions. In this case, the Proposed Findings and Technical Reports found that more than 50% of the RMI lived within a five-mile radius core area. The BIA later rescinded this finding, declaring that, while more than 50% of the RMI lived within a five-mile radius core area, this core area was not exclusively or near exclusively inhabited by the RMI, as required by 25 C.F.R. § 83.7(b)(2)(i). However, according to the RMI, even after shrinking the core down to the area inhabited exclusively by the RMI, 44% of the RMI's membership lives within that small core. Under the regulations, if the number of residents within the core area is less than 50%, the putative tribe must demonstrate that those outside the core maintain contact with those in the core. § 83.7(b)(2)(i). The BIA found that the evidence of interaction between core members of the RMI and members outside the core area was insufficient to establish the existence of patterns of significant contact between residents and non-residents. The RMI have not successfully refuted this finding.

7. *The Decision Resulted from Unlawful Racial Bias*

The RMI claim that the BIA's decision was the result of racial bias but present no evidence to support the claim. The mere fact that some scholars may have considered the previous work of a BAR historian racist does nothing to establish that racial bias influenced the decision in this case.

Furthermore, neutral references to the RMI's African and Dutch ancestry, mentioned for the purposes of establishing the RMI's history, are not evidence of racial bias.

8. *Manipulation of the Content of the Record*

The RMI have presented no evidence that the BIA exceeded its statutory authority under § 83.11(e)(8) in forwarding only critical documents to the IBIA for review on appeal. They provided no examples of information that was left out or hidden, and the fact that the BIA allowed the RMI to file their own supplement, organizing the information (most of which was already on the record) in their own way, indicates that the BIA did not attempt to bias the IBIA in any way through manipulation of the record.

9. *The BIA Lacks Special Expertise*

The RMI assails the competency of the BAR and BIA staff, but these contentions are irrelevant to whether the staff violated procedural regulations or acted in an arbitrary and capricious manner. The deference owed to the administrative agency prevents me from entertaining comparisons between the respective abilities of both sides' experts.

10. *The Decision Was Subject to Undue Influence*

Finally, the fact that information about the Proposed Decision was somehow leaked to Congressman Toricelli does not constitute evidence that the BIA was unduly influenced in its outcome by Atlantic City casino interests. Discussion in the Proposed Findings of the tribe's intent (or lack thereof)

to build a casino is also not evidence of influence upon the decision. The BIA states that it considered intent to build a casino as evidence of political organization, but that it found no consensus among tribe members.

* * *

A number of other arguments advanced by the RMI but not specifically addressed herein have been carefully considered and found to lack merit.

After carefully reviewing the briefs and arguments of the parties and the record of this case, I do not find that the BIA failed to adhere to its own regulations or that it acted arbitrarily, capriciously, or in violation of any law. The defendant's motion for summary judgment will accordingly be granted. An appropriate order accompanies this memorandum.

s/ James Robertson
JAMES ROBERTSON
United States District Judge

Dated: September 30, 2000

Appendix C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 98-2136 (JR)

THE RAMAPOUGH MOUNTAIN INDIANS
and CHIEF SILENT WOLF,

Plaintiffs,

v.

BRUCE BABBITT, Secretary,
U.S. Department of the Interior, *et al.*,

Defendants.

ORDER

For the reasons set forth in the accompanying memorandum, it is this 30th day of September, 2000,

ORDERED that plaintiffs' motion to supplement the administrative record [#50] is **denied**. It is

FURTHER ORDERED that plaintiff's motion to take judicial notice, to supplement the record, and for leave to file exhibits [#70] is **denied**. It is

FURTHER ORDERED that plaintiff's motion for leave to file legal authority [#73] is **granted**. And it is

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FURTHER ORDERED that defendant's motion for summary judgment [#31] is **granted**.

s/ James Robertson
JAMES ROBERTSON
United States District Judge

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED FEBRUARY 15, 2002

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 00-5464 **September Term, 2001**
98cv02136

Ramapough Mountain Indians and Silent Wolf,
Chief, Ramapough Mountain Indians,

Appellants

v.

Gale A. Norton, Secretary,
U.S. Dept. of the Interior, et al.,

Appellees

BEFORE: Ginsburg, Chief Judge; Rogers and Garland, Circuit Judges.

ORDER

Upon consideration of appellant's petition for rehearing filed January 29, 2002, it is

ORDERED that the petition be denied.

Per Curiam

Appendix D

FOR THE COURT:
Mark J. Langer, Clerk

BY: s/ Michael C. McGrail
Michael C. McGrail
Deputy Clerk

APPENDIX E — FEDERAL REGISTER NOTICE OF RECONSIDERED FINAL DETERMINATION OF THE DEPARTMENT OF THE INTERIOR BUREAU OF INDIAN AFFAIRS DATED DECEMBER 30, 1997

DEPARTMENT OF THE INTERIOR
Bureau of Indian Affairs

RECONSIDERED FINAL DETERMINATION

Reconsidered Final Determination Against Federal Acknowledgment of the **Ramapough** Mountain Indians, Inc.

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice.

SUMMARY: Pursuant to 25 CFR 83.11(h)(3), notice is hereby given that the Assistant Secretary — Indian Affairs Ada E. Deer signed a reconsidered final determination which affirms the decision of January 16, 1996, to decline to acknowledge that the **Ramapough** Mountain Indians, Inc. (RMI), P.O. Box 478, Mahwah, New Jersey 07430-0478, exists as an Indian tribe within the meaning of Federal law. The reconsidered final determination was issued following full consideration of four issues identified by the Interior Board of Indian Appeals (IBIA) and which the Secretary of the Interior requested the Assistant Secretary — Indian Affairs to address. The group does not satisfy three of the seven criteria set forth in 25 CFR 83.7, and therefore does not meet the requirements for a government-to-government relationship with the United States.

DATES: As provided by 25 CFR 83.11(h)(3), this reconsidered final determination will become effective January 7, 1998.

Appendix E

ADDRESSES: Requests for a copy of the reconsidered final determination should be addressed to the Office of the Assistant Secretary, Bureau of Indian Affairs, 1849 C Street, NW, Washington, D.C. 20240, Attention: Branch of Acknowledgment and Research, MS 4603-MIB.

FOR FURTHER INFORMATION CONTACT:
Holly Reckord, Chief, Branch of Acknowledgment and Research, (202) 208-3592.

SUPPLEMENTARY INFORMATION: This notice is published in the exercise of authority delegated by the Secretary of the Interior (the Secretary) to the Assistant Secretary — Indian Affairs (the Assistant Secretary) by 209 DM 8. A notice proposing to decline to acknowledge the **Ramapough** Mountain Indians was published in the Federal Register on December 8, 1993. Under the 1978 regulations for Federal acknowledgment of Indian tribes, the petitioner had not met four of the mandatory criteria (83.7(a), (b), (c), and (e)). The original 180-day comment period was extended until May 8, 1995. The 60-day comment period for the petitioner to respond to third-party comments ended on July 10, 1995.

The Bureau of Indian Affairs (BIA) began the final determination process on September 18, 1995. The final determination, made under the 1994 revised regulations, concluded that the RMI failed to meet three of the mandatory criteria (83.7(b), (c), and (e)). It was signed on January 16, 1996, and a notice was published in the Federal Register, on February 6, 1996, (Vol. 61, No. 25, 4476). The RMI filed a request for reconsideration with the IBIA, on May 6, 1996.

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The IBIA affirmed the Department of the Interior's (the Department) final determination on July 18, 1997. At the same time, the IBIA asked the Secretary to consider whether four specific issues identified by the IBIA constituted grounds for reconsideration of the final determination. On September 29, 1997, the Secretary requested the Assistant Secretary to address the four issues raised by the IBIA and issue a "reconsidered determination." Three of the four questions concerned issues of due process. The fourth issue involved the interpretation of criterion 83.7(b) of the Federal acknowledgment regulations (25 CFR Part 83). On November 7, 1997, the Assistant Secretary signed a reconsidered final determination, which affirms and supplements the final determination and supersedes specific points in the final determination. A brief discussion of the four issues discussed in the reconsidered final determination follows.

The first issue considered by the Assistant Secretary was whether the BIA had refused to furnish copies of the anthropologist's field notes to the RMI and, if so, whether this was a denial of due process and constituted a basis for reconsideration of the final determination. The RMI correspondence files were thoroughly reviewed, as well as notes taken on telephone conversations and the notes retained from meetings with the RMI. There was no evidence that the RMI had requested the anthropologist's field notes and no evidence that the field notes had been denied to the RMI. The Assistant Secretary determined that there was no denial of due process and, therefore, this was not a cause for reconsideration of the final determination.

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The second issue considered by the Assistant Secretary was whether the BIA failed to provide consultation concerning the date of beginning the final determination evaluation process and, if so, whether this failure violated the RMI's rights to due process and constituted a basis for reconsideration. The Secretary determined that the intent of Sec. 83.10(l) is to allow the BIA to inform the petitioner of the proposed time frame for beginning or completing the final determination evaluation if a long administrative delay is expected before the final determination evaluation will begin, or when new evidence submitted by the petitioner is so extensive that the evaluation will require more than the regulatory 60-day period. The BIA did not expect any delays in beginning the final determination evaluation because personnel were available to do the work immediately. Further, the amount and character of the evidence submitted by the RMI in its response to the proposed finding were such that it could be evaluated within the 60-day timeframe. The Department also considered the reasons delineated in the RMI's requests to suspend the final determination process and notified the RMI in writing of its decision to continue with the evaluation. The final determination was issued within the 60-day regulatory time-frame. The Assistant Secretary determined that written notification, without prior oral consultation, was not a denial of due process and was not grounds for reconsideration of the final determination.

The third issue evaluated by the Assistant Secretary was whether the BIA had misled the RMI concerning RMI's required research. The Assistant Secretary also considered whether failure to notify the RMI of a change in the Assistant Secretary's conclusions on criterion 83.7(b) between the

proposed finding and the final determination was a denial of due process. The Assistant Secretary also evaluated whether either of these matters constituted grounds of reconsideration.

The petitioner was told to focus its research on the pre-1850 time period since there was no evidence that its members descended from an historical Indian tribe. However, a review of the administrative files showed that the RMI were notified in several letters and in meetings with the BIA staff that they had to address all four of the criteria not met at the time of the proposed finding. These letters and the proposed finding clearly show that the RMI had actual notice that there was insufficient evidence for community from historical times to the present. The proposed finding technical reports and the summary under the criteria pointed to this lack of evidence. The Assistant Secretary determined that there was no denial of due process on this point and no grounds for reconsideration.

The proposed finding concluded that the RMI did not meet criterion 83.7(b) at any point in time. The final

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determination concluded that the RMI met criterion 83.7(b) between 1870 and 1950, but not before 1870 and not after 1950. The change in the Assistant Secretary's conclusions between the proposed finding and final determination was the result of a change in the wording of criterion 83.7(b) in the 1994 revised regulations, in conjunction with the BIA researchers' discovery of new, supplementary evidence that RMI had maintained a community from 1870 to 1950,

including a church register which showed a high rate of endogamy among the petitioner's ancestors from 1878 to 1918. The RMI was not harmed by this change between the proposed finding and the final determination, but in fact benefited from the refined conclusions in the final determination. The Assistant Secretary is not required to notify petitioners of changes in conclusions between a proposed finding and a final determination before the final determination is signed. The Assistant Secretary determined that, while there had been a change in conclusions between the proposed finding and the final determination, failure to notify the RMI of the change was not a denial of due process and is not grounds for reconsideration.

With regard to the fourth issue, the IBIA asked the Secretary to clarify whether or not the Department required petitioners to live in a "village-like setting" in order to meet the requirements of criterion 83.7(b) and, if so, to make this requirement invalid. The Assistant Secretary clarified in the reconsidered final determination that neither the Department nor the regulations require petitioners to live in a "village-like setting." The regulations do require that petitioner's maintain a community from the time of first-sustained contact with non-Indians to the present. The reconsidered final determination discusses the fact that evidence demonstrating that a petitioner's members live in a "village-like setting" and maintain consistent interaction with the remainder of the membership may be sufficient evidence to meet criterion 83.7(b), but it is not required (83.7(b)(2)). There are many other forms of evidence that may be used to demonstrate that petitioner's members have maintained social relations with each other (83.7(b)(1)). The reconsidered final determination also corrected

an error in the final determination's summary of the proposed finding's conclusions about the residential distribution of the RMI members.

The reconsidered final determination supplements the original final determination and supersedes it to the extent the original is inconsistent with the reconsidered final determination. In conjunction with the original final determination, the reconsidered final determination is an amended final determination for the RMI petitioner.

Dated: December 30, 1997.
Kevin Gover,
Assistant Secretary — Indian Affairs.

APPENDIX F — FEDERAL REGISTER NOTICE OF FINAL DETERMINATION OF THE DEPARTMENT OF THE INTERIOR BUREAU OF INDIAN AFFAIRS DATED DECEMBER 30, 1997

DEPARTMENT OF THE INTERIOR
Bureau of Indian Affairs

FINAL DETERMINATION

Final Determination Against Federal Acknowledgment of the **Ramapough** Mountain Indians, Inc.

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice of Final Determination.

SUMMARY: This notice is published in the exercise of authority delegated by the Secretary of the Interior to the Assistant Secretary — Indian Affairs (Assistant Secretary) by 209 DM 8.

Pursuant to 25 CFR 83.10(m), notice is hereby given that the Assistant Secretary declines to acknowledge that the **Ramapough** Mountain Indians, Inc. (RMI), c/o Mr. Ronald Van Dunk, 200 Rte. 17 So., P.O. Box 478, Mahwah, New Jersey 07430-0478, exists as an Indian tribe within the meaning of Federal law. This notice is based on a determination that the group does not satisfy three of the criteria set forth in 25 CFR 83.7, namely: 83.7(b), 83.7(c), and 83.7(e).

DATES: This determination is final and is effective May 6, 1996, pursuant to 25 CFR 83.10(l)(4), unless a request for reconsideration is filed pursuant to 25 CFR 83.11.

Appendix F

A notice of the Proposed Finding to decline to acknowledge the **Ramapough** Mountain Indians, Inc. was published in the Federal Register on December 8, 1993 (58 FR 64662, Dec. 8, 1993). The original 180-day period provided for in the regulations for comment on the Proposed Finding closed April 6, 1994. At the petitioner's request, it was extended until October 7, 1994; again until April 7, 1995; and again until May 8, 1995. The 60-day period provided for in the regulations (25 CFR Part 83.10(k)) for the petitioner to respond to third-party comments ended July 10, 1995. This determination is made following a review of the **Ramapough** Mountain Indians, Inc.'s response to the Proposed Finding to decline to acknowledge, of the public comments on the Proposed Finding to decline to acknowledge, and of the **Ramapough** Mountain Indians, Inc.'s response to the public comments.

The Proposed Finding to decline to acknowledge the **Ramapough** Mountain Indians, Inc. was issued under the 1978 Federal acknowledgment regulations (43 FR 39361-39364, Sept. 5, 1978). On April 22, 1994, the **Ramapough** Mountain Indians, Inc., requested that the final determination be issued under the 1994 revised Federal acknowledgment regulations. This Final Determination is issued under the revised regulations.

This determination is final and will become effective 90 days from the date of publication, unless a request for reconsideration is filed pursuant to Sec. 83.11. The petitioner or any interested party may file a request for reconsideration of this determination with the Interior Board of Appeals (Sec. 83.11(a)(1)). The petitioner's or interested party's request must be received no later than 90 days after publication of the Assistant Secretary's determination in the Federal Register (Sec. 83.11(a)(2)).

Appendix F

Because of changes in the revised regulations and new evidence located by the Government's researchers, the conclusions for this Final Determination are slightly different from those reached in the Proposed Finding under criteria 83.7(a), 83.7(b), and 83.7(c). The Proposed Finding determined that the RMI did not meet criterion 83.7(a). There was no evidence that the petitioning group had been identified "from historical times until the present on a substantially continuous basis, as 'American Indian' or 'aboriginal' " (25 CFR 83.7(a), 1978). The 1994 revision of the 25 CFR Part 83 regulations was designed to reduce the burden of proof on petitioners. Identification as an Indian entity by external observers from first sustained contact with non-Indians until 1900 is no longer required by criterion 83.7(a). Under the 1994 regulations, the RMI meets criterion 83.7(a), identification by external observers as an American Indian entity, for the period since 1900. This finding is based upon a determination by the Assistant Secretary — Indian Affairs that consistent scholarly and popular identification of a group as a tri-racial isolate believed to have an American Indian component shall constitute evidence for identification of the group as an American Indian entity.

The Proposed Finding determined that the petitioner's ancestral group did show community for the period 1870-1950, based on extensive endogamy and geographical residential concentration.

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However, under the 1978 regulations, this was not adequate to meet criterion 83.7(b), as the 1978 wording required that there be a distinct "community viewed as American Indian"

[emphasis added]. This wording was removed in the 1994 revision of criterion 83.7(b), which now requires only the existence of a distinct community. The regulations continue to require, under both criteria 83.7(b) and 83.7(c), that a petitioning group show continuity from the time of first sustained contact with non-Indians until the present.

Under the provisions of the revised regulations, the **Ramapough** Mountain Indians, Inc. has been found to meet criteria 83.7(b) and 83.7(c) for a limited period of time, from 1870 until about 1950. No new evidence concerning criterion 83.7(c) was submitted for the final determination. However, under a provision of the 1994 revised regulations that was designed to reduce the burden of proof on petitioners, it is automatically assumed that when a group meets criterion 83.7(b) with a sufficient level of evidence (endogamy of greater than 50 percent; geographically proximate residence of greater than 50 percent, etc.), it also will have met criterion 83.7(c) for the same period of time. Based on this linkage between the two criteria, it is determined that the **Ramapough** Mountain Indians, Inc. has met criterion 83.7(c) for the period 1870-1950.

The modifications under the revised regulations do not change the ultimate finding concerning criteria 83.7(b) and 83.7(c), however, since the requirement of continuous existence as a social community (83.7(b)) and continuous exercise of political influence or authority over the group's members (83.7(c)), from the time of first sustained contact of the historical tribe, or tribes which amalgamated and functioned as a single political entity, with non-Indians until the present, remains in force. Meeting a criterion for a limited

period is not sufficient to meet the criterion overall, because of the requirement of continuous existence. No adequate evidence has been submitted to show the continuous existence of a community from first sustained contact with non-Indians until 1870, or from 1950 to the present. Therefore, the petitioner does not meet criterion 83.7(b). No new evidence was submitted to show the continuous exercise of political influence or authority within the group from first sustained contact with non-Indians until 1870, or from 1950 to the present. Therefore, the petitioner does not meet criterion 83.7(c).

The Proposed Finding concluded that, "No evidence was found to substantially demonstrate Indian ancestry for the RMI membership which was derived from a historic tribe. It also could not be established that there is any Indian ancestry from isolated Indian individuals, and there is virtually no documentary evidence from historical records for such ancestry." No new evidence was submitted pertaining to criterion 83.7(e), descent of the petitioner's membership from a historical Indian tribe, or from tribes which amalgamated and functioned as a single political unit. The petitioner's response presented a re-analysis of the same evidence considered in the Proposed Finding to decline to acknowledge. The conclusion that the origins and parentage of the earliest generation of the petitioner's documented ancestors remain unknown is not changed in this final determination. Therefore, the **Ramapough** Mountain Indians, Inc., does not meet criterion 83.7(e).

Ada E. Deer,
Assistant Secretary — Indian Affairs.

APPENDIX G — PORTIONS OF BIA'S ACKNOWLEDGEMENT REGULATIONS

TITLE 25 — INDIANS

CHAPTER I — BUREAU OF INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR

PART 83 — PROCEDURES FOR ESTABLISHING THAT AN AMERICAN INDIAN GROUP EXISTS AS AN INDIAN TRIBE

Sec. 83.6 General provisions for the documented petition.

(a) The documented petition may be in any readable form that contains detailed, specific evidence in support of a request to the Secretary to acknowledge tribal existence.

(b) The documented petition must include a certification, signed and dated by members of the group's governing body, stating that it is the group's official documented petition.

(c) A petitioner must satisfy all of the criteria in paragraphs (a) through (g) of Sec. 83.7 in order for tribal existence to be acknowledged. Therefore, the documented petition must include thorough explanations and supporting documentation in response to all of the criteria. The definitions in Sec. 83.1 are an integral part of the regulations, and the criteria should be read carefully together with these definitions.

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(d) A petitioner may be denied acknowledg-ment if the evidence available demonstrates that it does not meet one or more criteria. A petitioner may also be denied if there is insufficient evidence that it meets one or more of the criteria. A criterion shall be considered met if the available evidence establishes a reasonable likelihood of the validity of the facts relating to that criterion. Conclusive proof of the facts relating to a criterion shall not be required in order for the criterion to be considered met.

(e) Evaluation of petitions shall take into account historical situations and time periods for which evidence is demonstrably limited or not available. The limitations inherent in demonstrating the historical existence of community and political influence or authority shall also be taken into account. Existence of community and political influence or authority shall be demonstrated on a substantially continuous basis, but this demonstration does not require meeting these criteria at every point in time. Fluctuations in tribal activity during various years shall not in themselves be a cause for denial of acknowledgment under these criteria.

(f) The criteria in Sec. 83.7 (a) through (g) shall be interpreted as applying to tribes or groups that have historically combined and functioned as a single autonomous political entity.

(g) The specific forms of evidence stated in the criteria in Sec. 83.7 (a) through (c) and Sec. 83.7(e) are not mandatory requirements. The criteria may be met alternatively by any suitable evidence that demonstrates that the petitioner meets the requirements of the criterion statement and related definitions.

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Sec. 83.7 Mandatory criteria for Federal acknowledgment.

The mandatory criteria are:

(a) The petitioner has been identified as an American Indian entity on a substantially continuous basis since 1900. Evidence that the group's character as an Indian entity has from time to time been denied shall not be considered to be conclusive evidence that this criterion has not been met. Evidence to be relied upon in determining a group's Indian identity may include one or a combination of the following, as well as other evidence of identification by other than the petitioner itself or its members.

(1) Identification as an Indian entity by Federal authorities.

(2) Relationships with State govern-ments based on identification of the group as Indian.

(3) Dealings with a county, parish, or other local government in a relationship based on the group's Indian identity.

(4) Identification as an Indian entity by anthropologists, historians, and/or other scholars.

(5) Identification as an Indian entity in newspapers and books.

(6) Identification as an Indian entity in relationships with Indian tribes or with national, regional, or state Indian organizations.

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(b) A predominant portion of the petitioning group comprises a distinct community and has existed as a community from historical times until the present.

(1) This criterion may be demon-strated by some combination of the following evidence and/or other evidence that the petitioner meets the definition of community set forth in Sec. 83.1:

(i) Significant rates of marriage within the group, and/or, as may be culturally required, patterned out-marriages with other Indian populations.

(ii) Significant social relationships connecting individual members.

(iii) Significant rates of informal social interaction which exist broadly among the members of a group.

(iv) A significant degree of shared or cooperative labor or other economic activity among the membership.

(v) Evidence of strong patterns of discrimination or other social distinctions by non-members.

(vi) Shared sacred or secular ritual activity encompassing most of the group.

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(vii) Cultural patterns shared among a significant portion of the group that are different from those of the non-Indian populations with whom it interacts. These patterns must function as more than a symbolic identification of the group as Indian. They may include, but are not limited to, language, kinship organization, or religious beliefs and practices.

(viii) The persistence of a named, collective Indian identity continuously over a period of more than 50 years, notwithstanding changes in name.

(ix) A demonstration of historical political influence under the criterion in Sec. 83.7(c) shall be evidence for demonstrating historical community.

(2) A petitioner shall be considered to have provided sufficient evidence of community at a given point in time if evidence is provided to demonstrate any one of the following:

(i) More than 50 percent of the members reside in a geographical area exclusively or almost exclusively composed of members of the group, and the balance of the group maintains consistent interaction with some members of the community;

(ii) At least 50 percent of the marriages in the group are between members of the group;

(iii) At least 50 percent of the group members maintain distinct cultural patterns such as, but not limited to, language, kinship organization, or religious beliefs and practices;

(iv) There are distinct community social institutions encompassing most of the members, such as kinship organizations, formal or informal economic cooperation, or religious organizations; or

(v) The group has met the criterion in Sec. 83.7(c) using evidence described in Sec. 83.7(c)(2).

(c) The petitioner has maintained political influence or authority over its members as an autonomous entity from historical times until the present.

(1) This criterion may be demonstrated by some combination of the evidence listed below and/or by other evidence that the petitioner meets the definition of political influence or authority in Sec. 83.1.

(i) The group is able to mobilize significant numbers of members and significant resources from its members for group purposes.

(ii) Most of the membership considers issues acted upon or actions taken by group leaders or governing bodies to be of importance.

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(iii) There is widespread knowledge, communication and involvement in political processes by most of the group's members.

(iv) The group meets the criterion in Sec. 83.7(b) at more than a minimal level.

(v) There are internal conflicts which show controversy over valued group goals, properties, policies, processes and/or decisions.

(2) A petitioning group shall be considered to have provided sufficient evidence to demonstrate the exercise of political influence or authority at a given point in time by demonstrating that group leaders and/or other mechanisms exist or existed which:

(i) Allocate group resources such as land, residence rights and the like on a consistent basis.

(ii) Settle disputes between members or subgroups by mediation or other means on a regular basis;

(iii) Exert strong influence on the behavior of individual members, such as the establishment or maintenance of norms and the enforcement of sanctions to direct or control behavior;

(iv) Organize or influence economic subsistence activities among the members, including shared or cooperative labor.

(3) A group that has met the requirements in paragraph 83.7(b)(2) at a given point in time shall be considered to have provided sufficient evidence to meet this criterion at that point in time.

(d) A copy of the group's present governing document including its membership criteria. In the absence of a written document, the petitioner must provide a statement describing in full its membership criteria and current governing procedures.

(e) The petitioner's membership consists of individuals who descend from a historical Indian tribe or from historical Indian tribes which combined and functioned as a single autonomous political entity.

(1) Evidence acceptable to the Secretary which can be used for this purpose includes but is not limited to:

(i) Rolls prepared by the Secretary on a descendancy basis for purposes of distributing claims money, providing allotments, or other purposes;

(ii) State, Federal, or other official records or evidence identifying present members or ancestors of present members as being descendants of a historical tribe or tribes that combined and functioned as a single autonomous political entity.

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(iii) Church, school, and other similar enrollment records identifying present members or ancestors of present members as being descendants of a historical tribe or tribes that combined and functioned as a single autonomous political entity.

(iv) Affidavits of recognition by tribal elders, leaders, or the tribal governing body identifying present members or ancestors of present members as being descendants of a historical tribe or tribes that combined and functioned as a single autonomous political entity.

(v) Other records or evidence identifying present members or ancestors of present members as being descendants of a historical tribe or tribes that combined and functioned as a single autonomous political entity.

(2) The petitioner must provide an official membership list, separately certified by the group's governing body, of all known current members of the group. This list must include each member's full name (including maiden name), date of birth, and current residential address. The petitioner must also provide a copy of each available former list of members based on the group's own defined criteria, as well as a statement describing the circumstances surrounding the preparation of the current list and, insofar as possible, the circumstances surrounding the preparation of former lists.

(f) The membership of the petitioning group is composed principally of persons who are not members of any acknowledged North American Indian tribe. However, under certain conditions a petitioning group may be acknowledged even if its membership is composed principally of persons whose names have appeared on rolls of, or who have been otherwise associated with, an acknowledged Indian tribe. The conditions are that the group must establish that it has functioned throughout history until the present as a separate and autonomous Indian tribal entity, that its members do not maintain a bilateral political relationship with the acknowledged tribe, and that its members have provided written confirmation of their membership in the petitioning group.

(g) Neither the petitioner nor its members are the subject of congressional legislation that has expressly terminated or forbidden the Federal relationship.

APPENDIX H — BIA GUIDELINES FOR PREPARING A PETITION FOR FEDERAL ACKNOWLEDGMENT

BIA GUIDELINES FOR PREPARING A PETITION FOR FEDERAL ACKNOWLEDGMENT (as in effect during BIA's review of RMI's petition)

* * *

54.7(e)(5) Other Records or evidence identifying the person as a member of the petitioning entity;

Other types of evidence include, but are not limited to, published family histories, family bibles, cemetery records, newspapers, and employment records; state, county, and local area histories; and unpublished manuscript collections. . . .